It is a question of fact to be decided in each case whether the lottery has been thrown open to the public or not.

Decision in *Chin Tin Chin* v. *Public Prosecutor*, (1933-1934) F.M.S.L.R. dissented from and not followed.

E. Jeff for the appellant.

Ma'arof bin Haji Zakariah, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

MUDIE, J.—The appellant was convicted of selling lottery tickets, an offence under section 4 (i) (d) of the Common Gaming Houses Enactment, 1912.

It appears from the definition of "lottery ticket" in section 2 (i) of the Enactment that it only extends to tickets in a public lottery. It follows, therefore, that the offence created by section 4 (i) (d) only extends to such tickets, and has no application to a private lottery.

The prosecution has proved and the appellant does not deny that he was selling tickets issued by the Ch' Hui Toh Club, Penang, in an unlimited cash sweep on the Kuala Lumpur Race Meeting of the 17th March, 1934.

The defence is that the lottery is a private one, and therefore not within the scope of the Enactment.

Lai Hock Chor, who is a member of the Committee of the Ch' Hui Toh Club, Penang, gave evidence to the following effect:—

> "This Club runs lotteries on various horse races in Kuala Lumpur and elsewhere. The lotteries are confined to members of the Club only. No member of the public can get a ticket from the Club. Exhibits C, D, and E are tickets issued by the Club on races to be held in Kuala Lumpur. The accused is not a member of the Club. He is a stranger to me. Accused has no authority to sell lottery tickets of my Club. Exhibit A was issued by the Club to a member named Gan Ee."

Though the appellant was selling these tickets to members of the public, it is contended, nevertheless, that the lottery is a private one.

Section 2 of the Common Gaming Houses Enactment, 1912, provides that "public lottery" means "a lottery to which the public or any class of the public has or may have access, and every lottery shall until the contrary be proved be deemed to be a public lottery."

It is contended for the appellant that unless the public can get tickets from the Club it is not a public lottery.

It is said that the position of a member of the public is entirely different from that of a member of the Club, as the Club will not recognise him. Only a member of the Club has any right to the prize money, and the member of the public can only recover it by the favour of a member of the Club.

In my view, however, their position is essentially the same. Neither has any right of action to recover the prize money. Neither in practice has any difficulty in recovering it.

The main argument for the appellant is that where the organisers of a lottery intend it to be a private one, nothing done by an unauthorised person can convert it into a public one. The Club only issues tickets to members. If a member without the authority of the Club disposes of his ticket to some one else, the Club cannot be held responsible. The argument proceeds that if tickets are sold to the public without the authority of the Club, the lottery is not thereby converted into a public one.

This argument has the support of a recent decision of Howes, J., in *Chin Tin Chin* v. *The Public Prosecutor*, Perak Criminal Appeal No. 16 of 1934, (1933-1934) F.M.S.L.R., a case which is on all fours with the present one. The cashier of a bank sold tickets in a lottery, which was intended by its organisers to be a private one, to members of the public. The learned Judge held that such unauthorised sale of tickets to the public did not change the status of the lottery.

With great respect I am compelled to take a different view. It is clear from the definition that the test of a public lottery is whether the public has access to it or not. In my opinion the fact that the organisers intend it to be a private lottery is not conclusive. They may have taken every reasonable precaution against public access. But if in fact the measures they have taken are ineffective to prevent the tickets reaching the public, the lottery is a public one.

It is urged for the appellant that if this argument is carried to its logical extreme, the sale or gift of a ticket by a member of a Club to a friend who is not a member will convert the lottery into a public one. I do not think that is necessarily so. A member can give tickets to a friend without making them available to all and sundry. It seems to me that whether such action on the part of a member throws the lottery open to the public or not is a question of fact to be decided on the evidence in each case.

The sole test of the nature of the lottery is whether the public has access to it or not. In this case the accused was selling tickets to any one who cared to buy them. In the face of that it seems to me impossible to argue that the lottery is a private one. In my opinion the learned Magistrate was right in holding that this is a public lottery, and in convicting the accused.

The appeal will be dismissed.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

BURTON, J.

May 29, 1934.

SABASTIAN RATNAM & THANGAVELU.... Appellants

vs.

PUBLIC PROSECUTOR.....Respondent

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 11 of 1934]

The Criminal Procedure Code, 1926, amended by The Criminal Procedure (Amendment) Enactment, 1928, section 320 — Costs against the Public Prosecutor.

In proceedings under Part VII of The Criminal Procedure Code, 1926, where the circumstances of the case are sufficiently exceptional, *e.g.* where in a case of kidnapping the prosecution made no attempt to prove the age of the child nor to explore the corroborative evidence which was mentioned in the information for warrant, costs will be awarded against the Public Prosecutor.

K. K. Benjamin for the appellants.

R. C. Cussen, Deputy Legal Adviser, for the respondent.

Cur. Ad. Vult.

BURTON, J.—I allowed the appeal of both appellants on 24th May, and set aside their convictions and sentences. Mr. Benjamin, counsel for the appellants, then applied for costs under section 320 of the Criminal Procedure Code, and I adjourned the matter for further argument. Section 320 of the Code corresponds with section 309 of the Colony Code, but it has no counterpart in India, and I can find nothing parallel in England. The section was introduced into our Code by Enactment 14 of 1928, and the one case under the repealed section *Low Leong Huat* v. *Public Prosecutor*, 2 F.M.S.L.R. 162 at page 174 does not help. Neither does the case of *Ho Chik Kwan* v. *Public Prosecutor*, (1931-1932) F.M.S. L.R. 271, give us any assistance; for that is a decision of the Court of Appeal, and was not the result of proceedings under Part VII of the Code. In the *Public Prosecutor* v. *Mydin*, Selangor Criminal Appeal No. 11 of 1932 (unreported) Mudie, J., allowed the successful respondent costs in an appeal, but that was an appeal from an acquittal on a charge under section 323 and was in no way parallel to this case, and costs were ordered not against the Public Prosecutor but against Sheikh Daud the real appellant. There is no record of Mudie, J's reasons.

There is very little more authority in the Colony. In the case of *Leong Yeok* v. *Reg.*, 1 S.S.L.R. 117, the Court refused costs on the ground that, except in the case of *Reg.*, v. *Chong Ah Pye*, 4 Kyshe 597, it had not been the practice to give costs in Magistrate's appeals. In this latter case the appellant asked for costs, the Attorney-General replied that costs were never given, but that he did not know why, and O'Malley, C.J., said that he saw no reason why costs should be refused and gave the appellants their costs of the appeal.

I have therefore to decide this point without authority. It is clear that the principle hinted at in *Chong Ah Pye* (*ubi sup.*) that costs should follow the event has never been adopted either in the Colony or in the Federated Malay States. Mr. Benjamin did not contend for the principle, but admitted that the case must show some exceptional character before the order could be made. Cave, J., said in *Stubbs* v. *Director of Public Prosecutions*, (1890) 24 Q.B.D. 577, at page 581:—

> "If the prosecution was not vexatious in its inception, but has failed by reason of the difficulty of proving the case, or even by reason of the intervention of the Director of Public Prosecutions, those seem reasons, not why the Director of Public Prosecutions should pay the costs, but why the defendant should not get his costs, and unless it was shewn that the prosecution was vexatious, that is, begun or continued without reasonable and probable cause, or frivolous, I imagine that the Court, in the due exercise of its discretion, would decline to give the defendant the costs of the trial."

In this case the appellants were arrested on a warrant for kidnapping, but as I said at the hearing of the appeal the warrant was wrongly issued by the Magistrate. I do not think that the fact is relevant to the question of costs because the appellants had another remedy. But as soon as the appellants were arrested, kidnapping being a seizable offence, the Public Prosecutor under Chapter XIII of the Code must take charge of the proceedings. I do not know whether a police investigation was undertaken under the chapter. It is inconceivable that the facts were at any time properly put before the Public Prosecutor. But even if they were not, that does not help him; for under section 119 they ought to have been. The appellants were charged with kidnapping, and the case proceeded to conviction. A police officer conducted the prosecution, but made no attempt to prove the age of the child, nor to explore the corroborative evidence which was mentioned in the information for the warrant. Mr. Cussen pointed out that the appellants ought to have been charged with abduction under the same section of the Code, and that although they had been wrongly charged with kidnapping the Magistrate himself under section 171 (h) ought to have amended the charge. That is no doubt true, but I do not think that the Public Prosecutor can shelter himself behind the Magistrate when the charge of kidnapping was brought at his instance, and the police officer at the trial acting on his behalf did not suggest the alteration of the charge.

On the record I do not think that a conviction for abduction could possibly be upheld, but the case for costs might have been different if the conviction had been for abduction. As it is, the two appellants have been forced to appeal against a conviction on a charge which there was absolutely no justification in bringing, and it is difficult to conceive a stronger case for awarding costs, if costs are ever to be given.

I conclude therefore that the circumstances of this case are sufficiently exceptional to justify an order for costs, and I award costs which I assess at $25/- for each appellant to be paid by the Public Prosecutor.

Appeal allowed.